IN THE

# Supreme Court of the United States

OCTOBER TERM, 1942.

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No. .....

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THE HARTFORD ELECTRIC LIGHT COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

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## BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

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### Reference to Opinions Below.

The opinions and orders of the Federal Power Commission are reported at 37 P. U. R. (N. S.) 193 and 44 P. U. R. (N. S.) 515, and appear at R. 1060 and 1276. The opinion of the Circuit Court of Appeals for the Second Circuit is reported at 131 F(2d) 953, and appears at R. 1293.

### Statement of Jurisdiction.

The Federal Power Commission, by an order entered February 25, 1941, (R. 1073) required the Petitioner to comply with Order No. 42 and other orders relating to "public utilities" within the meaning of the Federal Power Act, and to file data required by Electric Plant Accounts Instruction 2-D of the Uniform System of Accounts of the Commission; and by an order dated October 21, 1941, (R. 1282) reaffirmed the order of February 25, 1941. The United States Circuit Court of Appeals for the Second Cir-

cuit affirmed this determination (R. 1320). The petition for writ of certiorari herein is filed in accordance with the provisions of Section 313(b) of the Federal Power Act (49 Stat. 860, 16 U. S. C. A. Sec. 8251) and Section 240 of the Judicial Code, as amended (43 Stat. 938, Sec. 1, 28 U. S. C. A. Sec. 347). The judgment of the Circuit Court of Appeals was entered February 2, 1943, and the petition herein was filed in this Court within three months thereafter.

## Statement of the Case.

The nature of the proceedings below and a statement of the facts therein are contained in the petition for writ of certiorari hereinabove printed.

## Specification of Errors.

1. The Court below erred in holding that The Hartford Electric Light Company is a "public utility" within the meaning of the Federal Power Act.

2. The Court below erred in holding that the sales of electric energy by Hartford to The Connecticut Power Company are sales in interstate commerce.

3. The Court below erred in failing to hold that since the only facilities of Hartford are used for generation and for local distribution, Hartford is specifically excluded from the jurisdiction of the Federal Power Commission by the second sentence of Section 201(b) of the Federal Power Act. It erred in holding that the corporate organization, contracts, accounts, memoranda, papers and other records of Hartford are "facilities" within the meaning of Section 201 of the Federal Power Act, and in holding that any of the facilities of Hartford are for interstate transmission or sale.

4. The Court below erred in holding Hartford to be a "public utility" within the meaning of the Act even though all its affairs are regulated by the State of Connecticut.

5. The Court below erred in holding that the Commission need make no findings of uncontested facts material to the controversy "based on legal criteria which (it) deem(s) fallacious and which (it) rejected."

## Summary of Argument.

The Federal Power Act is a narrow statute conferring a restricted jurisdiction upon the Federal Power Commission, intended to stop an existing gap in regulatory authority over electric utility companies. This meaning is proven by changes knowingly made by the Congress transforming an original bill of broad scope presented to it by the Federal Power Commission into a final enactment of exceedingly limited scope, by the statements of the Chairmen of the Congressional Committees in charge of the matter, by the declaration of policy in the statute and by the striking peculiarities of the specific terms of the statute.

Since the only facilities of Petitioner are used for generation and for local distribution, Petitioner is specifically excluded from Federal regulation by the second sentence of Section 201(b) of the Federal Power Act. The word "facilities" in the statute does not include intangibles such as corporate organization or incidental tangibles such as books and records.

A sale between domestic corporations, wholly consummated within a State, the vendor being without knowledge of or control over the ultimate destination of the article sold, and the vendee being free to resell within the State or to ship interstate, is not a sale in interstate commerce such as to subject the vendor to Federal regulation, merely by reason of the fact that the vendor knows, however accurately, that the vendee does transmit part of the purchased product interstate. The Act does not subject to federal regulation any transaction over which, absent the Act, the States have regulatory power.

The Federal Power Commission, an administrative agency, is required to find the basic facts upon which a con-

troversy depends, and may not confine its findings to ultimate facts sufficient to support its own legal theory of the answer to the controversy.

## ARGUMENT.

### I.

### The Statutory Pattern of Power.

The basic problem is to discover the pattern of regulatory power delineated by Congress in the Federal Power Act. We discover it from the history of the Act and from its terms.

The impetus for the enactment was the decision of this Court in *Public Utilities Commission of Rhode Island* v. *Attleboro Steam & Electric Company*, 273 U. S. 83, by which a gap in the regulatory authority over electric utilities was revealed.

The first draft of a bill was presented to Congress by representatives of the Federal Power Commission. They assured the Congress that the bill was to stop the gap made plain by the *Attleboro* case. But the State Commissions protested that the text went further than the declared objective. We have printed on page 30 of this brief, Section 201, the jurisdictional section, of the bill as it was originally presented to Congress, on page 31 the bill as it was passed by the Senate, and on page 32 (unfolded) the Act as finally adopted. A comparative reading of these texts shows the following changes pertinent to the present inquiry.

1. The bill as presented by the Power Commission would have placed under Federal jurisdiction "the production of energy for such (*i.e.*, interstate) transmission and sale". That provision was stricken out and a provision was inserted specifically *excepting* facilities used for generation. (201(b).)

2. The bill proposed by the Commission would have placed under Federal jurisdiction "all facilities connected

therewith as parts of a system of power transmission situated in more than one State". That provision was stricken out by Congress:

3. The proposed bill would have placed under Federal jurisdiction "every person who controls, directly or indirectly", a person otherwise subject to Federal jurisdiction. That provision was stricken from the final Act.

4. Congress inserted in the final Act a provision not in the original bill, that Federal regulation should "extend only to those matters which are not subject to regulation by the States"; and a limitation that federal jurisdiction should extend only to the "business" of transmitting, etc.

In short, the Commission proposed to the Congress a sweeping scheme of Federal regulation. It would have subjected to its control generation for interstate sale or transmission, all facilities connected with interstate facilities, and all persons who directly or indirectly control a person engaged in interstate transactions. Congress rejected the proposal. Perhaps anticipating some degree of persistence on the part of the Commission in its views, Congress not only struck the broad clauses, but asserted in clear language that the jurisdiction conferred by the Act should not extend to matters over which the States had power, and with equal clarity it excluded facilities used for generation or for local distribution.

The Commission in this case, and before this Court in the *Jersey Central* case, *supra,* is urging precisely the same views which it originally presented to the Congress and which were there emphatically rejected. The Commission is merely asking the Court to reinsert in the statute provisions which Congress knowingly struck from it, and to delete provisions which Congress intentionally inserted.

This Court is familiar with the Committee Reports and statements of the Chairmen of the Committees.

The structure of the Act as finally approved indicates its meaning. Section 201 is the jurisdictional statement. It

declares the policy and defines "public utility". The other sections thereafter relate to "public utilities". For example, the much-discussed Sections 203, 204 and 301 all provide for the regulation of "public utilities" and "licensees", and of no other person. In some sections, Congress gave the Commission only certain concurrent jurisdiction over "public utilities", and in such instances carefully spelled out the bounds of its action, lest otherwise the Federal assumption of authority over the defined persons be deemed completely exclusive. The definition of "public utility" is the key to the whole Act.

We ask the Court to refer again to Section 201 of the Act, on page 32 of this brief, unfolded for convenience. Paragraph (e) defines a "public utility" and premises its definition upon "facilities subject to the jurisdiction of the Commission". The second sentence of paragraph (b) describes the facilities subject to that jurisdiction.

As we read these sentences of the statute, we are at once struck by two unusual features. A "public utility" is not a person who sells in interstate commerce, or who transmits in interstate commerce. It is a person who owns or operates *facilities for* such sale or transmission. Is there a difference? Clearly there is. A person might sell or transmit in interstate commerce as an incidental or collateral matter, using no facilities at all for the purpose or using facilities which are really owned and operated for some other purpose. We keep this peculiarity of the statutory definition in mind as we examine the other features of this Section 201.

We look at the second sentence of paragraph (b). If the facilities are for interstate sale or transmission, Federal authority attaches. But if the facilities are used for generation or local distribution, they are excluded from Federal power. This latter clause is carefully phrased and its words are meaningful. Will the Court carefully note the use and placement of the word "only" in this sentence of the statute? If facilities are used for generation, they are excluded. If they are used for local distribution, they are

excluded. But—and here is the point to be noted—if they are used "*only*" for intrastate transmission, they are to be excluded. It would appear that if they are used at all for generation or local distribution, they are excluded, but transmission facilities are excluded only if they are used *wholly* for intrastate business. We keep this peculiarity in mind as we proceed further with our examination of the section.

We turn now to paragraph (a), because, since it is the declaration of policy, it should shed light upon the meaning of the definitive provisions if the latter be doubtful. Three features of paragraph (a) are noteworthy. It declares "the business" of sale and transmission in interstate commerce to be in need of Federal regulation—not mere acts of sale or transmission, not incidental activity, not collateral transactions, but "the business". Next, it relates to transmission and sale *in* interstate commerce—not affecting, or causing, or resulting in, but only "in". Then it carries the much-discussed last three lines limiting this newly-exercised authority "to those matters which are not subject to regulation by the States". *All three of these characteristics are restrictive.* They are not expansive. They are narrow, not broad. They are striking by contrast to many other statutes passed about the same time, in which Congress entered upon regulation of broad scope in other fields.

Questions immediately arise in anyone's mind: Can it be that Congress refrained from asserting so evident a power as its power to control a company generating for interstate use, or facilities used in part for interstate purposes? Would such a plan of enactment achieve an even, uniform regulation of all electric companies? Would not the statute so construed prevent complete Federal regulation? The answers are as easy as the questions. Congress deliberately, intentionally, and expressly did not assert in this Act the full measure of its Constitutional power, but on the contrary affirmatively refrained from asserting more

than the minimum of power necessary to close the then-existing gap in regulation. Congress was not attempting regulation, uniform or otherwise, of all electric companies. It was not attempting but was consciously preventing complete Federal control.

Such was its declared purpose, such is the only possible meaning of its actions in respect to the bill originally presented to it, and such is the clear meaning of the precise terms of the Act. Production of electric energy is subject to State authority even if the energy produced moves directly into interstate commerce. *Utah Power & Light Company* v. *Pfost, supra.* For that reason, Congress excepted from Federal jurisdiction "facilities used for generation". For the same reason, it excepted "facilities used for local distribution". For the same reason, it struck from the original bill the provisions in regard to generation for interstate sale, interconnected facilities and controlled persons. As to each of these, State power of control exists.

If permitted to fit together, without straining or squeezing, all these indices of the meaning of this statute point to a complete, perfectly proportioned instrument for establishing Federal regulatory authority where State power does not exist. Any other reading, any attempt to fit the terms of the Act to another purpose, or to reconcile any other purpose with the Congressional history, is strained, unnatural and contradictory. We respectfully insist that no coherent or satisfactory reading of this statute can possibly be made if it be assumed that Congress was trying to accomplish an objective in any respect similar to the objectives it sought in the Labor Relations Act, or the Wage Standards Act or the others similarly familiar. The statute simply does not fit such purpose at any point

It is important, we respectfully urge, that it be kept in mind that Congress itself wrote this statute. It did not accept the proposals of the Executive branch of the Government. It rewrote in its own Committees the bill offered by the administrative Commission. What we are endeavor-

ing to ascertain is the *Congressional* intent, not the Executive intent. It is plain to every reader of the Commission's claims in this and in the *Jersey Central* case that the Commission is now asserting what has been its intent from the beginning, quite regardless of the fact that Congress rejected those proposals, and declined to attempt those objectives. The Commission argues for Federal control of facilities interconnected with interstate facilities. It argues for control over generating facilities if the product eventually reaches interstate movement; and similarly throughout its entire presentation. Those were intentions of the Commission upon offering the original bill, but they were not within the Congressional intent in enacting the Act. The contest here is precisely what it was before the Congressional Committees. Surely the statute must be read in the light of Congressional intent, and its phrases must be given natural meanings.

We submit that the pattern of power designed by Congress in this field, revealed by the legislative history, the declaration of policy in the Act, and by the terms of the Act in detail, was that Federal jurisdiction should not attach where State power existed. Congress meant to stop a very narrow gap. It did not mean to create a vast Federal organization to take over a great majority of the functions theretofore exercised by the States.

## II.

### Sales.

The Court below held that Petitioner "cannot possibly lack knowledge of the fact that the sales by it to Connecticut Power are indispensable to those Exchange arrangements which culminate in the transmission to, and sale of, considerable quantities of electric energy in Massachusetts", and "is fully aware that some energy is unavoidably destined by the buyer for interstate use" (R. 1305). Upon the basis of that knowledge on the part of Petitioner the Court

held it to be engaged "in" interstate commerce. Analysis will show that the whole of the Court's decision rested upon that premise; because if the sales were not in interstate commerce, the facilities were not for interstate commerce, and so Petitioner was not a "public utility".

The view of the Court is in conflict with decisions of this Court, particularly *Superior Oil Co.* v. *Mississippi, supra,* and *Utah Power & Light Company* v. *Pfost, supra.*

The scope of the doctrine announced below is tremendous. A grower of cotton in Alabama who knows that at least a portion of his product is indispensable to transactions in interstate commerce on the part of some one of the chain of subsequent owners, and knows that some part of his product is unavoidably destined by the buyer for interstate use, would be engaged in interstate commerce as he grows his cotton. The whole structure of Federal-State relationship, as built upon decisions of this Court, would totter, if not topple, if this view be now adopted. Without developing the point in this brief, such distinctions as that made by this Court in *Mulford* v. *Smith,* 307 U. S. 38, between *Currin* v. *Wallace,* 306 U. S. 1, and *Townsend* v. *Yeomans,* 301 U. S. 441, would disappear. The doctrine of *Oliver Iron Mining Company* v. *Lord,* 262 U. S. 172, and of *Coverdale* v. *Arkansas-Louisiana Pipe Line Company,* 303 U. S. 604, would likewise be destroyed. And the cases already mentioned, *Superior Oil* and *Utah Power and Light* would be reversed. The cases and situations which would be affected are too numerous to mention.

We know of no authority which holds that a State may not regulate a sale consummated wholly within a State in which the buyer, without control by the vendor, is free to, and does, thereafter ship across the State line. We understood Assistant Attorney General Shea to concede in the reargument of the *Jersey Central* case, that in the absence of Federal legislation, the State could regulate such sales. It necessarily follows that if the present statute be interpreted as establishing Federal jurisdiction over those sales,

it has impinged to that extent upon State authority. Such impingement is clearly contrary to both the intent and the terms of this statute.

The Court below relied upon the *Kalem* case (*Kalem Co.* v. *Harper Bros.*, 222 U. S. 62). The Court fell into an incidental inadvertence in its reference to that case, its quotation being a reference to *Graves* v. *Johnson*, 156 Mass. 211, and 179 Mass. 53, and not a reference to the facts in the *Kalem* case. It is quite clear that the *Kalem* case is in no way similar to the present one, because in that case the defendant "not only expected but invoked by advertisement" the action which gave rise to plaintiff's claim. In *Graves* v. *Johnson*, *supra*, an agent of the Massachusetts vendor visited the vendee in Maine, a dry state, and took the orders for the purchase in that State. The Supreme Court of Massachusetts held the sale legal even though the vendor knew the vendee's intention to effect a subsequent illegal resale in Maine, holding that the vendor's knowledge of the illegal purpose was indifferent. The Court also relied upon *Louisville and Nashville R. R. Co.* v. *Parker*, 242 U. S. 13, in which the question was whether the deceased was moving an empty car for the purpose of reaching an interstate car. Much closer to the point in the pending case is *Dept. of Treasury of Indiana, et al.* v. *The Wood Preserving Company*, 313 U. S. 62.

The Court below relied upon *People's Natural Gas Co.* v. *Federal Power Commission*, 127 F. (2d) 153, but that case involved a sale across state lines, just as the *Attleboro* case did, the only difference being that delivery was on the near side of, instead of at, the state line.

Furthermore, the clear intent of the Federal Power Act would be nullified if the view of the Court below be adopted. The knowledge which Petitioner possessed could have been gleaned by anyone from casual conversations, from public reports, from trade journals, and even from Government publications. Every generator of electric energy is familiar with the system connections of his purchasers. If mere

knowledge, however accurate, be sufficient to place one in interstate commerce, few indeed are not included. The statute was not drawn to be so broad.

The essence of Petitioner's contention on this point may be stated as follows:

On the basis of the facts in this record, could Petitioner successfully evade the jurisdiction of the Connecticut Commission over its sales to the Connecticut Power Company on the ground that they were sales in interstate commerce? We submit that no court would deprive the Connecticut Commission of jurisdiction over these sales.

## III.

### Facilities.

Petitioner neither owns nor operates any property except its generating plant and its local distribution system. The second clause of the second sentence of Section 201(b) provides:

> "The Commission * * * shall not have jurisdiction except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or over facilities used in local distribution * * *."

(The specific provisions in this Part and the Part next following relate to wars, emergencies, etc., and have no part in the pending problem.)

We submit that the language is quite clear. It was meant to preserve to local control operations which have always been so controlled. "As local as the generation of electrical power" is a figure of speech used by this Court (*Coverdale v. Arkansas-Louisiana Pipe Line Company*, 303 U. S. 604) to express locality beyond question. The statute is clear and the intent is clear.

The Court below correctly felt that to be a "public utility" a company must own or operate facilities for interstate sale or facilities for interstate transmission. At once

apparent is the difficulty of bringing this Petitioner within the limited class thus defined. Because it is a simple physical fact, insusceptible of contradiction, that Petitioner owns and operates no property whatever beyond what is used in its generation and its local distribution. The Court below reasoned, however, that where there is a sale in interstate commerce there must be a facility for such sale, and therefore, since it had already held Petitioner's sales to be sales in interstate commerce, Petitioner must have facilities for such sales. The problem was: Where? The Court found two possibilities.

First, it held that if generating facilities are aids to interstate sales, they thereby become facilities for such sales, and so within the Federal authority. Of course, that suggestion is untenable upon the language of the statute, and the Court quite frankly said that the negative clause must be interpreted "as if it read" differently from the way it does read. But the statute is quite simple. It says, "The Commission shall not have jurisdiction over facilities used for generation." Language could hardly be more clear. There is no additional proviso reading "unless they are aids to interstate sales". Not only so, but a phrase to that effect—"production of energy for such sales"—was stricken by Congress from the bill originally proposed. And since generation even for interstate sale has always been held subject to State regulation (*Utah Power & Light Company* v. *Pfost, supra*) the Court's interpretation runs precisely counter to the last clause of Section 201(a). But the Court waves this latter clause aside as too general, and says that Congress could not have intended that transactions covered by the *Attleboro* case should be exempt from Federal regulation merely because they are carried on by facilities also used for intrastate commerce. Here is a misconception of the *Attleboro* case and this case. In the former there was a sale across State lines and transmission up to the State line. Petitioner here does neither. To be sure, The Connecticut Power Company furnishes electric energy across the State line and

it has not been denied that its transmission activity subjects it to federal regulation. But we are not here concerned with Connecticut Power. Even so, a more complete study (R. 1197) than is possible in this brief would show that the Exchange operations of that Company are to be *encouraged*, not *controlled*, by the Commission under Section 202(a) of the statute, and those "encouraged" under that Section do not thereby become "public utilities".

This confusion of the Court below in regard to the *Attleboro* case and the intent and meaning of this statute arises in part because the Court attempts to treat a transaction in electric energy from generation to consumption as though it were one and inseparable. In fact the Commission in its opinions acknowledged this to be a necessary premise in its position. But this Court, and this statute, have treated electric energy by the rules applicable to commodities. A complete transaction in electric energy has four separate parts, generation, transmission, distribution and consumption. Generation has always been subject to State regulation, even though the energy moved forthwith across the State line. *Utah Power and Light* v. *Pfost, supra,* settled that question. Similarly, distribution has always been held to be subject to State control even though the product came directly off interstate lines. *So. Car. Power Co.* v. *S. C. Tax Com.*, 52 F. (2d) 515; 60 F. (2d) 528; 286 U. S. 525.

Congress was not, in the Federal Power Act, attempting to impose Federal control over the whole series of events which transpire when generation is in one State and consumption in another. It was trying only to regulate those transactions which lay beyond State authority. Reasoning from that intent it is easy to see why facilities used for generation and facilities used in local distribution were excluded from Federal jurisdiction.

In order to derive any except the foregoing meaning from the statute, Congress must be credited with extremely inept draftsmanship. So long as the various statements of pur-

pose made by Committee Chairmen and in the Act itself are given full face value the draftsmanship appears competent and accurate. For example, we notice the three expressions, "for", "used for" and "used only for" in the second sentence of 201(b). The word "for" carries an element of intent or design; "used for" is entirely factual; "used only for" is exclusive. These are the ordinary meanings of the words. The statute says that if facilities are "for" interstate sale they are included, but if "used for" generation or "used only for" intrastate transmission they are excluded. Read with the ordinary meanings of the words used, the clause reflects the intent expressed by the Congressional Committees and is consistent with the declaration in 201(a). Any other reading requires violence to the precise text, as the opinion of the Court below clearly shows.

Thus the effort to construe generation facilities as facilities for sales, even if the energy passes forthwith into interstate commerce, leads into a series of errors. By specification they are: (a) Refusal to accept the declared intent of Congress, (b) misconception of the *Attleboro* case, (c) failure to apply to electric energy the rules applicable to commodities, (d) failure to follow *Utah Power & Light Company* v. *Pfost*, (e) refusal to read the words of the statute in their clear and natural meaning.

The second possibility suggested by the Court is that Petitioner's corporate organization, contracts, records, books and accounts are facilities for interstate sales. In the first place, there is nothing in the record in this case to show that Petitioner has any records, books, contracts or papers for interstate transactions. Every such book, paper, or contract of which mention appears is for local distribution or generation uses. In fact, so far as the record shows, the Petitioner's accounts do not even contain information about any interstate transactions. All such information in the record came from the accounts, etc., of The Connecticut Power Company. There is nothing to show that Petitioner could ascertain from its own records, etc., anything about

interstate transactions. Certainly nothing appears which would support an assumption that Petitioner has any such facilities for interstate sales.

As a matter of lexicology, the word "facilities" does not customarily include books, etc. Webster defines the word thus: "A thing that promotes the ease of any action, operation, transaction, or course of action". Thus defined the word does not include corporate organization, which is not a thing, or books and records, which do not promote the ease of the transaction but merely record its occurrence. These transactions would be the same if there were no books, records or papers in respect to them. In Words and Phrases many references to uses of the word are given, but none referring to such things as books of account, etc. In *Borough of Swarthmore* v. *P. S. C.*, 277 Pa. 472, 121 A. 488, 489, the word was held not to include a contract. In the Interstate Commerce Act the word refers to switches, spurs, tracks, terminals, locomotives, cars, etc. (49 U. S. C., Sec. 1.(3)). "Facilities" in the revenue acts is held to refer to "tangible things", such as generators, pumps, houses, wiring, etc. *Briggs Mfg. Co.* v. *U. S.*, 30 F. (2d) 962.

But the chief reply to this part of the opinion of the Court lies in the fact that it would change the whole meaning and effect of the statute. The definition of Federal jurisdiction plainly rests upon "facilities for" transmission or sale, and strikingly does not rest upon transmission or sale alone. But if it be assumed, without proof, that there is a record of every sale, and if it be then held that such record is a facility for sale within the meaning of the statute, the limiting effect of the statutory provision is wiped out. The whole meaning is changed. The statutory reference to the "business", the specific exclusion of facilities used for generation or local distribution, all disappear from the statute if such meaning be given the word "facilities".

The fact is that even if there be an interstate sale, there need not necessarily be a facility for such sale. Direct sales, on the premises, by manufacturers or farmers are fre-

quently without "facilities" for sales purposes. There are, of course, many articles which are clearly facilities for sales; for example, counters, scales, measuring devices, etc. The present record is conclusive that Petitioner owns and operates no such facilities for interstate sales.

We come back to the intent of Congress. The Court below held that Congress meant to impose Federal control upon all phases of transactions in electric energy from generation to consumption whenever the two occur in different States. We think Congress in this statute was doing the same sort of thing which this Court made clear in the three tobacco cases, *Mulford* v. *Smith, supra, Currin* v. *Wallace, supra,* and *Townsend* v. *Yeomans, supra.* In the tobacco situation there was a Federal statute which regulated sales in interstate commerce and facilities for such sales, and a State statute which regulated the production and the producer of the tobacco. The Court had no difficulty in holding both statutes valid, saying that the Federal statute regulating sales did not purport to regulate production. But that production was in aid of those sales just as certainly as the generation in this case is in aid of these sales. And to pursue an accurate analogy further, suppose that instead of selling his tobacco at an auction warehouse (clearly a "facility for sale"), the producer had simply walked out into the field with the purchaser, and said, "There it is. Haul it away." There would have been no "facility for sale" involved. The plan of Congress in that situation is clear. It placed under Federal supervision the facilities for interstate sales, but it left to State control the production of tobacco, even production for those very interstate sales. It did the same here. Petitioner has no facilities for interstate sales.

## IV.

### State Regulation.

Special Counsel for the Public Utilities Commission of Connecticut appeared under subpoena as a witness and testified (R. 195 *et seq.*) that all of Petitioner's rates and contracts with Connecticut Power have been filed in past years with that Commission, that the Commission has jurisdiction over these matters, that Petitioner has never made any claim to the contrary, and that Petitioner has no power under its charter to engage in interstate commerce. Under decisions of this Court, Petitioner is subject to regulatory control by the State. See particularly *Utah Power & Light Company* v. *Pfost, supra.*

Under the clear language of the last clause of Section 201(a) of the statute, Petitioner is not included within the jurisdiction of the Federal Commission. The Court below paid no attention to this phase of the case, giving it merely a passing reference.

## V.

### Findings.

The Commission made no findings of fact descriptive of the physical properties of Petitioner, or its facilities, or its operations, contracts or transactions, or as to the disposition of energy by The Connecticut Power Company, or as to the regulation of Petitioner by the State of Connecticut. All these facts were material to the controversy and all were proven without contradiction on the record. They were the basic facts upon which the ultimate conclusions must rest.

Upon authority of *Saginaw Broadcasting Co.* v. *Federal Communications Commission*, 96 F(2d) 554, 559-564; cert. denied, 305 U. S. 613, we submit that failure to find the basic facts material to the controversy is reversible error.

This point is so important in the field of administrative law as alone to justify the granting of the writ of cer-

tiorari. If an administrative agency can decline to make any findings of fact based upon legal criteria which it rejects, then both respondents before the Commission and the Courts upon review of them, are helpless.

**Conclusion.**

This Court said in the *Utah Power and Light case*, *supra*, that the rules relating to interstate commerce in commodities must be applied to electric energy. That being so, the pending case is simply this: A manufacturer of cotton cloth in Alabama sells his product at his counter inside his factory. A purchaser comes into the factory, buys cloth at the counter, takes it as far as the door on a floor truck belonging to the factory, puts the cloth into his own truck and conveys it to his place of business. Thereafter he sells some of the cloth in Alabama and makes some of it up into shirts which he ships to a store in Boston. The latter fact is known definitely to the manufacturer from whom he bought the cloth, because the two men are brothers-in-law. The question in the case is: Would the entire business of the manufacturer of the cloth be subject to Federal regulation under a statute such as the Federal Power Act? The simple answer is that at the very most the manufacturer is causing or affecting or making possible interstate commerce, and Congress struck from the proposed bill a clause placing Federal control over production for interstate use.

The Court below erred in the following phases of its opinion:

It refused to treat electric energy as a commodity. It held these sales to be identical with those in the *Attleboro* case. It relied upon *Peoples Natural Gas Co.* v. *Federal Power Commission*, *supra*, and upon the *Kalem* case, *supra*. It held knowledge on the part of a manufacturer that part of his goods are "unavoidably destined by the buyer for interstate use" to be sufficient to put the manufacturer in interstate commerce. It ignored the in-

tent of Congress. It misconstrued Section 201(b). It gave no effect to Section 201(a). It ignored the word "business" in the statute. It paid no attention to the existing complete control of Petitioner by the State Commission of Connecticut.

The writ should be granted.

Respectfully submitted,

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